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Supreme Court of the United States

OCTOBER TERM, 1934.

No. [redacted] 28

PETE DI GIOVANNI AND MARY DI GIOVANNI,
PETITIONERS,

VS.

CAMDEN FIRE INSURANCE ASSOCIATION, A
CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT THEREOF.

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No. .....

PETE DI GIOVANNI AND MARY DI GIOVANNI, PETITIONERS,

VS.

CAMDEN FIRE INSURANCE ASSOCIATION, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI and BRIEF IN SUPPORT THEREOF.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Pete Di Giovanni and Mary Di Giovanni respectfully shows to this Honorable Court:

A.

Summary of Matter Involved.

The respondent insurance association issued two fire insurance policies on May 15, 1933, as follows: One for $3,000.00, naming the petitioners, Pete Di Giovanni and Mary Di Giovanni, as the insured, covering a two-story brick building in Kansas City, Missouri, and the other for $1,500.00, concededly issued to Pete Di Giovanni alone, covering the personal property or contents in said building in Kansas City, Missouri.

On April 5, 1933, fire insurance on said building had been procured from the Old Colony Insurance Company in the sum of $5,000.00, and on May 13, 1933, from St. Louis Fire & Marine Insurance Company in the sum of $2,500.00, and on May 13, 1933, from Eureka Security Fire & Marine Insurance Company in the amount of $2,500.00, and on May 26, 1933, in the sum of $2;000.00 in the Eureka Security Fire & Marine Insurance Company. This made a total of $15,000.00 fire insurance on the building.

On April 5, 1933, fire insurance on the contents of the building in the sum of $1,000.00 had been procured from Eureka Security Fire & Marine Insurance Company, and on April 5, 1933, in the sum of $3,200.00 in the Old Colony Insurance Company. This made a total of $5,700.00 fire insurance on the contents of the building.

On June 13, 1933, a fire occurred in said building, damaging the building and the contents.

On December 21, 1933, the respondent, Camden Fire Insurance Association (as complainant), filed its bill of

complaint in the United States District Court against petitioners, Pete Di Giovanni and Mary Di Giovanni (as defendants), alleging that it was a New Jersey corporation; that defendants were citizens and residents of Missouri, and that the matter in controversy, exclusive of interest and costs, exceeded $3,000.00. The bill of complaint then alleged the issuance and delivery of the $3,000.00 policy and the $1,500.00 policy aforementioned, stating, as to each of said policies, "a copy of which policy is filed herewith, made a part hereof, and marked Exhibit "A." ("B"). (Rec. pp. 1, 2.) The bill of complaint further alleged the issuance of the other policies by the other companies above detailed, and it further alleged the occurrence of said fire. Then the bill of complaint alleged that the policies were procured from different agencies and that complainant had no knowledge of the issuance of the policies other than those issued by itself until after the fire.

The bill of complaint proceeds to allege that all of the policies were procured by defendants as a part of a general scheme and plan to defraud the complainant and the other insurance companies; that in furtherance of said plan the defendants caused the property to be set fire; that the defendants procured insurance far in excess of the value of the building and its contents from different agencies, as a part of said general plan and scheme to defraud, and in order that they might set fire to the property and collect an exorbitant price for the building and its contents; that the defendants represented to complainant and certain of the other companies named that they would not procure in excess

of $5,000.00 insurance on the building and $3,200.00 insurance on the contents; that the procurement by defendants of the aforesaid policies from different agencies was done to mislead complainant and the other insurance companies named, and as a part of the general scheme and plan of defendants to burn their property and collect a large sum of money; that immediately following the fire complainant ascertained said facts and denied liability upon the policies and tendered to defendants the amount of premiums paid by defendants for the policies, with legal interest thereon. (Rec. p. 3.)

The bill of complaint further makes the following allegation: "Complainant alleges that the said building was of a value not to exceed six thousand ($6,000.00) dollars." (Rec. p. 2.)

The bill of complaint further alleges that defendants have filed proofs of loss against all of the companies claiming a total loss "although said loss was not total," and that defendants have threatened to sue complainant upon the two policies issued by complainant as therein set forth, to recover the face amount of said policies. (Rec. p. 3.)

Said bill of complaint further alleges that it is the intention of defendants to use the two said policies of fire insurance issued by complainant as a means of consummating the said fraudulent purpose, scheme and plan "and, unless restrained by your Honorable Court, will institute two actions at law against complainant on said policies of fire insurance in an effort to consummate said fraud." (Rec. p. 3.)

The bill of complaint further alleges that the title to the real property stands in the name of defendants, Pete Di Giovanni and Mary Di Giovanni, husband and wife, as an estate by the entirety. It does not state how the title to the personalty stood, but the policy and the opinion of the district court show the personalty was insured in the name of Pete Di Giovanni alone. (Rec. pp. 3, 4.)

On January 10, 1934, petitioners filed a special motion to dismiss respondent's bill of complaint on the grounds that the court had no jurisdiction and that the bill does not state facts sufficient to constitute a cause of action in equity against the defendants, either jointly or severally, and that it appeared by the plaintiff's bill that it was not entitled to the relief prayed for or any relief. (Rec. p. 5.)

On March 20, 1934, the district court sustained the special motion to dismiss. (Rec. p. 5.) The court filed a memorandum opinion setting forth the reasons for sustaining said motion, to-wit, that the matter in controversy did not exceed $3,000.00 for that the policy on the building only amounted to exactly $3,000.00, and that the policy on the personalty only amounted to $1,500.00, and that the personalty policy ran to Pete Di Giovanni alone, whereas the building policy ran to both defendants. The court ruled that the two policies could not be joined because the parties therein were not the same, and that the two policies were separate and distinct contracts, requiring different measures of proof and recovery. (Rec. pp. 10, 11.)

Upon appeal to the United States Circuit Court of Appeals for the Eighth Circuit, the decree of the district court was reversed February 14, 1935. (Rec. p. 14.) The circuit court of appeals handed down an opinion (Rec. pp. 14-19) in which it ruled as follows (Rec. pp. 18-19):

> "So, in the instant case, plaintiff is seeking to cancel these policies on which, should the defendants successfully maintain actions at law, they will recover $4,500.00, and in the circumstances of this case, the allegations of the bill of complaint being admitted, we think that is the amount in dispute and in controversy between the parties. (Rec. p. 18.) * * * In the first place, in this case there is a charge of conspiracy, and there are at least two of these policies, so that it would require at least two actions at law and materially increase plaintiff's expenditures in litigation, whereas, the matter, if cognizable in equity, can be disposed of in one suit. But there is still a further answer to this contention. The adequate remedy at law which will prevent the maintenance of a suit in equity in the federal court is a remedy at law available in the federal court. Considered as law actions the claims of the defendants are separate, and the amount in controversy cannot be aggregated, so that the plaintiff can secure no remedy at law in the federal trial court, nor, indeed, would an appeal lie from the ultimate decision of the State Supreme Court to the Supreme Court of the United States, because there is no federal question involved, and the parties are private parties. Plaintiff being free to seek its remedy in the federal court, has a right to insist that the rem-

edy at law which will preclude its right to maintain this suit in equity shall be a remedy in the federal court.

"It follows that the court was in error in concluding that it did not have jurisdiction, and the judgment appealed from is, therefore, reversed and the cause is remanded for further proceedings consistent herewith." (Rec. pp. 18, 19.)

On March 14, 1935, the petitioners filed in the circuit court of appeals a petition for rehearing, and, also, their motion to complete the record, and their suggestions in support thereof. (Rec. pp. 21, 28.) The said motion was denied and the said petition for rehearing was overruled on March 18, 1935. (Rec. p. 29.)

In the motion to complete the record petitioners moved the court to remit the transcript of the record to the district court below, authorizing and directing said district court to cause to be incorporated therein by way of supplemental record or otherwise, the two insurance policies issued by the respondent and referred to in its original bill of complaint and by reference incorporated in said bill as a part thereof. As reasons for the motion, petitioners stated in the motion that said policies or exhibits had become material and important in the determination of the appeal, particularly those provisions which provided that other insurance might be carried on the property, *and that the appellant insurance company should be liable only for its propor-*

tionate part of the entire loss, and that the transcript of record as then filed in said circuit court of appeals failed to include said Exhibits A and B (the insurance policies) referred to in its bill.

The petition for rehearing raised the points stated in the next paragraph as the precise points involved here.

The precise points involved in this petition for certiorari are these:

1. If the real subject matter of a bill in equity is a threatened suit or suits at law *in a state court* which are not removable to a federal court, and the facts stated in the bill in equity would constitute a complete defense at law in said suit or suits in the state court, is an equity suit maintainable in the federal court on the ground that there is no adequate remedy at law in the federal court?

2. Where the face amount of the policies exceeds $3,000.00 but the bill of complaint on its face shows that the actual loss and liability is less than $3,000.00, is the jurisdictional amount of a federal court involved?

3. Is there a multiplicity of suits involved where the judgment in either of the two threatened suits would be *res judicata* and preclude recovery in the other suit, neither of said threatened suits having been filed at the time the bill in equity was filed?

4. Can an insurance company by charging a conspiracy to defraud, tie together two claims arising under two separate contracts of insurance, one covering real property and the other personal property, aggregating the amounts of the two claims so as to make the required amount for federal jurisdiction?

B.

Reasons Relied On for the Allowance of the Writ.

The circuit court of appeals as will appear from the argument, *post*, has decided, in a way probably untenable:

(a) Important questions of federal law which should be settled by this court.

(b) Important federal question in a way in conflict with decision of another circuit court of appeals on the same matter.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this court for its review and determination, on a day certain to be therein named, the full and complete transcript of the record and all proceedings in this case, numbered and entitled on its docket No. 10062, in Equity, *Camden Fire Insurance Association, a Corporation, Appellant, vs. Pete Di Giovanni and Mary Di Giovanni, Appellees*, and that the

said judgment of the Eighth Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

Pete Di Giovanni and
Mary Di Giovanni,
Petitioners.

By HARRY L. JACOBS,
Kansas City, Mo.,
Counsel for Petitioners.

JAMES DALEO,
W. T. WOODFORK,
Kansas City, Mo.,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1934.

No. .....

PETE DI GIOVANNI AND MARY DI GIOVANNI, PETITIONERS,

VS.

CAMDEN FIRE INSURANCE ASSOCIATION, A CORPORATION, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Eighth Circuit Court of Appeals is reported as *Camden Fire Insurance Association, a Corporation, Appellant,* v. *Pete Di Giovanni and Mary Di Giovanni, Appellees,* (opinion not yet reported). (Rec. pp. 14, 19.)

II.

Jurisdiction.

1.

The writ of certiorari is applied for under Rule 35 of this court and Title 28, Section 347, U. S. C. A., and is the proper remedy.

Ex parte Lau Ow Bew, 141 U. S. 583, 12 S. Ct. 43.

2.

The date of the judgment in the trial court is March 28, 1934. (Rec. p. 5.) An appeal was duly perfected and the opinion of the circuit court of appeals rendered February 14, 1935 (Rec. p. 14), and judgment of that court entered thereon on February 18, 1935. (Rec. p. 19.) Petition for rehearing was filed March 14, 1935 (Rec. p. 29), and denied March 18, 1935. (Rec. p. 29.)

3.

Petitioners claimed on appeal that:

1. Respondent has a plain, adequate and complete remedy at law, to the threatened suits on the policies, in that it may assert its defenses in the state court suits.

2. In a case where there are two insurance policies covering different properties, each being of an insufficient amount requisite for federal jurisdiction, and wherein different parties are insured and where the measure of proof and recovery under the two contracts is different, the sums of the two contracts of insurance, to-wit: $1,500.00 and $3,000.00 could not be aggregated so as to make the required amount for federal jurisdiction.

3. Multiplicity of suits is not involved, because judgment for defendant in either suit would be *res judicata* and prevent recovery in the other suit.

The circuit court of appeals held the allegation of fraudulent combination and concerted design and action in respondent's bill of complaint tied together the claims and made the aggregate of the claims the matter in dispute; that there being two policies it would require two actions at law, thereby materially increasing the insurance carrier's expenditures in litigation, whereas, the matter, if cognizable in equity, could be disposed of in one suit; that the adequate remedy at law which will prevent the maintenance of a suit in equity in the federal court is a remedy at law available in the federal court, and considered as law actions, the claims of petitioners cannot be aggregated for removal purposes and for that reason respondent can secure no remedy at law in the federal trial court.

III.

Statement of the Case.

Under the heading (A) in the petition, *supra*, is a full statement of the case so far as material to the consideration of the questions presented and, in the interest of brevity, the statement is not repeated at this point.

IV.

Specification of Errors.

(1)

The Circuit Court of Appeals for the Eighth Circuit erred in overruling petitioners' motion to complete the record.

(2)

The Circuit Court of Appeals for the Eighth Circuit erred in ruling that complainant could maintain its bill in equity because it would have no adequate remedy at law in the federal court in the event separate suits were filed on the policies in the state court.

(3)

The Circuit Court of Appeals for the Eighth Circuit erred in holding that the jurisdictional amount of $3,000.00 was involved, in view of the fact that the actual liability of complainant under both policies would only total $2,700.00.

(4)

The Circuit Court of Appeals for the Eighth Circuit erred in holding that the two claims arising under the two policies of insurance issued by it could be tied together by the charge of concerted design and action to defraud, for the purpose of ascertaining the amount involved for jurisdictional purposes.

(5)

The Circuit Court of Appeals for the Eighth Circuit erred in holding there was equitable jurisdiction in the case at bar because of multiplicity of suits, or because of a threatened multiplicity of suits, for the reason that a judgment in favor of the complainant in either of said threatened suits would be a complete bar to recovery in the other.

V.

Summary of Argument.

POINT A.

Petitioners' motion to complete the record should have been sustained.

See argument under Point C.

POINT B.

Where the great object of a bill in equity is to enjoin the prosecution of threatened suits at law in the state court on insurance policies, the bill does not state a cause of action in equity if the defense may be asserted in the state court, even though the case would not be removable to the federal court.

(1)

The rule that the complainant must have an adequate remedy at law in the federal court does not apply to actions to restrain suits at law which are only cognizable in state courts. Such is the spirit underlying 28 U. S. C. A., Sec. 379, prohibiting federal courts from enjoining actions pending in state courts, and 28 U. S. C. A., Sec. 384, denying equity jurisdiction when there is an adequate remedy at law.

(2)

Where the subject of equitable relief is a suit at law in a state court, not removable to the federal court, then no possible injury can flow therefrom if a complete defense can be asserted in the state court. Hence a bill in equity to restrain same does not state

a cause of action calling for equitable interposition, since no real danger or injury is disclosed.

Cable v. *United States Life Ins. Co.*, 191 U. S. 288, 48 L. Ed. 232, 24 S. Ct. 74.

Pomeroy's Equity Jurisdiction, 4th Ed., Vol. 5, Sec. 2107, p. 4750, Note 55.

Graham v. *Rd.*, 118 U. S. 161, 6 S. Ct. 1009.

Phillips v. *Negley*, 117 U. S. 665, 6 S. Ct. 901.

Niagara Fire Ins. Co. of N. Y. v. *Adams*, 198 F. 822 (C. C. A. 1).

But see *Massachusetts Protective Assn.* v. *Stephenson*, 5 F. Supp. 586 (D. C. Ky.).

POINT C.

Although the face amount of respondent's policies was $4,500.00, its bill in equity disclosed that the actual liability thereon was $2,700.00. Consequently, jurisdictional amount was not involved.

(1)

Respondent and other insurance companies carried a total of $15,000.00 fire insurance on the building. Complainant alleged that the building was of a value not to exceed $6,000.00. Respondent's policy was for $3,000.00. It was, therefore, liable for one-fifth of the total loss, or $1,200.00. Adding the $1,500.00 personalty policy, the actual amount involved was only $2,700.00.

New York Life Ins. Co. v. *Johnson*, 255 F. 958 (C. C. A. 8).

Swan Island Club v. *Ansell*, 51 F. (2d) 337 (C. C. A. 4).

Maryland Cas. Co. v. *Price*, 231 F. 397, l. c. 403 (C. C. A. 4).

Menssen v. *Trav. Ins. Co.*, 5 Fed. Supp. 114 (D. C. N. Y.).

Cowell v. *City Water Supply Co.*, 121 F. 53 (C. C. A. 8).

Ex Parte Phoenix Ins. Co. of London et al., 117 U. S. 367, 6 S. Ct. 772.

Mechanics Ins. Co. of Phila. v. *C. A. Hoover Distilling Co.*, 173 F. 888 (C. C. A. 8).

Wisconsin Central Ry. Co. v. *Phoenix Ins. Co. et al.*, 123 F. 989 (C. C. Wisc.).

Norton v. *Larney*, 266 U. S. 511, 45 S. Ct. 145.

Smith v. *McCullough*, 270 U. S. 456, 46 S. Ct. 338.

(2)

The insurance policies referred to in respondent's bill of complaint were not included in the record. Petitioners' motion in the circuit court of appeals to complete the record by showing said policies should have been sustained because said policies each contain a provision that the respondent should only be liable for its proportion of the loss, where there was other insurance.

Federal Equity Rule 76.

Fairbanks, Morse & Co. et al. v. *American Valve & Meter Co. et al.*, 276 U. S. 305, 48 S. Ct. 317.

Barber Asphalt Paving Co. v. *Standard Asphalt & Rubber Co.*, 275 U. S. 372, 48 S. Ct. 183.

Hobbs v. *National Bank of Commerce of Kansas City*, 93 F. 615 (C. C. A. 2).

Rule 23 of 8th Circuit Court of Appeals.

POINT D.

The amount of the two policies should not have been tied together in order to ascertain the amount involved for jurisdictional purposes.

McDaniel v. *Traylor*, 196 U. S. 415, 25 S. Ct. 369, involved a conspiracy to fix John Evans' debts on the estate of Hiram Evans, deceased. Consequently, the entire amount of John Evans' debts was the amount involved, although the debts were held by various claimants.

In *Sovereign Camp* v. *O'Neill*, 266 U. S. 292, 45 S. Ct. 49, the object of the conspiracy was to ruin the defendant by numerous meritless suits. The object was not to collect the various separate amounts sued for in the meritless suits. The singleness of the main object tied into one the incidental claims, which were really devices or overt acts to accomplish the main single object.

POINT E.

No multiplicity of suits was involved in the two threatened state court suits, because a judgment for defendant in either would have been res judicata in the remaining suit. This is so because petitioner, Pete Di Giovanni, was necessarily a plaintiff in each suit, and no liability could be made out against the insurance company in either suit unless Pete Di Giovanni could establish liability.

Niagara Fire Ins. Co. et al. v. *Adams et al.*, 198 F. 822, l. c. 823 (C. C. A. 1).

Stifel's Union Brewing Co. v. *Saxy*, 273 Mo. 159, 201 S. W. 67.

Fulbright v. *Phoenix Ins. Co.*, 44 S. W. (2d) 115 329 Mo. 207.

VI.

Argument.

POINT A.

(Specification 1.)

The circuit court of appeals erred in overruling petitioners' motion to complete the record.

The argument under this point logically falls in with the argument under Point C and will be found there.

POINT B.

(Specification 2.)

The circuit court of appeals erred in ruling that complainant could maintain its bill in equity because it would have no adequate remedy at law in the federal court in the event separate suits were filed on the policies in the state court.

The complainant's bill alleges that two suits were threatened, namely, one on the $3,000.00 policy on the building, and the other on the $1,500.00 policy on the personalty. Neither of these suits would be removable to the federal court. Although the alleged fraud set up in the complainant's bill of complaint would constitute a complete defense in the state court, yet the circuit court of appeals held that fact immaterial for the reason that complainant had no adequate remedy at law or defense *assertable in the federal court.*

This presents a very interesting question upon which we frankly concede we have been unable to find any decision squarely in point. The importance of this is

apparent because, if the opinion of the circuit court of appeals correctly declares the law, in every future case where there is more than one policy issued by the same company (or there is one policy for more than $3,000.00, but threatened suit is for a smaller installment then due) and the defense is fraud in the procurement of the policies, the insurer will defeat the insured's right to a trial by jury by resort to bill in equity in the federal court for cancellation and injunction.

We believe that the rule that the complainant must have an adequate remedy at law *in the federal court* has no application to cases where the active subject matter of the bill (really a bill of peace or *quia timet*) and the "great object" (91 U. S. 254, 257) thereof are to restrain prosecution of threatened suits at law, themselves cognizable only by state courts. Certainly to so apply the rule would run counter to the spirit and public policy which underlie 28 U. S. C. A., Sec. 379, which prohibits federal courts from enjoining proceedings already pending in state courts, and 28 U. S. C. A., Sec. 384, which denies equity jurisdiction to federal courts when there is an adequate remedy at law, and to the Seventh Amendment to the Constitution which preserves in federal courts the right to trial by jury in cases involving more than $20.00.

If one sues in equity to enjoin prosecution of threatened suits at law in a state court, surely, to state a cause of action in equity, he must demonstrate in his bill that there is a real cause for apprehension of injury on his part. In considering whether or not the alleged danger is actual or whether it is only illusory, the

decisive test must be whether the defense is assertable *in the very forum where the danger is alleged to exist.* If such a threatened suit or suits could not be removed to the federal court, then clearly the only question is whether the defense is assertable in the state court.

If a wild animal is confined to a certain cage, no one has the right to complain that this animal is dangerous, merely by asserting that he cannot defend himself against it or slay it at some other place where it can never be. If the monster that the complainant seeks to decapitate by its bill can only rear its head in the state court, then in ascertaining whether or not it really is a monster or whether it is merely a myth (so far as danger is concerned) no question is involved of whether or not the sword that can render it harmless can be thrust in the federal court, where this monster can never appear. The question is whether a confined apparition can be dispelled in the only place where it is claimed it will appear or ever can appear, not whether it can be destroyed in a place where no one even claims it can ever possibly appear to frighten or injure the complainant. If one files a bill to abate a nuisance in Washington, D. C., in determining whether or not he has stated a cause of action, the only question is whether the alleged nuisance really constitutes a nuisance in the place that it actually is and will remain, not whether it would be a nuisance if in some other place where it never can be.

Where the subject of a bill for equitable relief is peculiarly a suit or suits at law which can only be filed in a state court, then no possible injury can flow therefrom if a complete defense can be asserted in that state court, and

it does not state a cause of action for equitable interference. *Strictly speaking, the point involved is not so much whether there is an adequate remedy at law or not. It is safer to plant the proposition on the ground that no cause of action is stated in equity because no real danger or injury inviting equitable interposition is disclosed under the pleaded circumstances.* The alleged poison is disclosed to carry along with it a complete antidote neutralizing it wherever the poison may appear.

This court has ruled that where the threatened suits at law would be removable to the federal courts, then no bill in equity will lie.

> *Cable* v. *United States Life Ins. Co.*, 191 U. S. 288, 24 S. Ct. 74.
>
> See, also, *Insurance Co.* v. *Bailey*, 13 Wall. (U. S.) 616.

The writer of the notes to the Fourth Edition of Pomeroy's Equity Jurisdiction, Vol. 5, Sec. 2107, p. 4750, Note 55, has this to say about it:

> "Some federal courts have found support for assuming jurisdiction on the extraordinary ground that the action to which complainant would be called upon to make defense might be an action in a state court. *Mutual Life Ins. Co.* v. *Pearson*, 114 Fed. 395, 397; *United States L. Ins. Co.* v. *Cable*, 98 Fed. 761, 763, 39 L. R. A. 264; *Mutual Life Ins. Co.* v. *Blair*, 130 Fed. 971. These cases have been practically overruled, however, in the late case of *Cable* v. *United States Life Ins. Co.*, 191 U. S. 288, 48 L. Ed. 232, 24 S. Ct. 74."

No doubt the reference in the above quotation was to the following language of this court in the opinion in the *Cable Case* (l. c. 78):

"Where a plaintiff in a state court which has jurisdiction over the subject matter brings the defendant properly within such jurisdiction, he is entitled to a trial of his cause in that court, unless the case be removed to a federal court upon some constitutional ground. If that ground exists, the removal can be made, but if it does not, equitable jurisdiction does not accrue to a federal court because it is thought the law as administered by that court more favorable to the party seeking its aid."

Cable v. *U. S. Life Ins. Co.*, 191 U. S. 288, 48 L. Ed. 232, 24 S. Ct. 74.

In cases dealing with bills in equity to restrain enforcement of judgments rendered by state courts, this court has ruled that no case in equity is stated if there is an adequate remedy at law *in the state court* by appeal from the judgment complained of. We see no distinction in legal principle where the defense may be presented at the original trial.

Graham v. *Rd.*, 118 U. S. 161, 6 S. Ct. 1009.

Phillips v. *Negley*, 117 U. S. 665, 6 S. Ct. 901.

See, also, *Niagara Fire Ins. Co. of N. Y.* v. *Adams*, 198 F. 822 (C. C. A. 1).

We call the attention of the court to the following case which squarely rules against our contention. However, we think it is based on a misconception of the implications to be drawn from the decisions of this court in the Cable and Bailey cases.

Massachusetts Protective Assn. v. *Stephenson*, 5 F. Supp. 586 (D. C. Ky.).

POINT C.

(Specification 3.)

The Circuit Court of Appeals for the Eighth Circuit erred in holding that the jurisdictional amount of $3,000.00 was involved, in view of the fact that the actual liability of complainant under both policies would only total $2,700.00.

(Point A, involving the motion to complete the record by showing the policies sued on, is argued under this heading, also.)

The bill alleges the following policies of fire insurance on the building:

$3000.00	Camden Fire Ins. Association	5-15-33
2000.00	Eureka Security, etc.	5-26-33
2500.00	Eureka Security, etc.	5-13-33
2500.00	St. Louis Fire & Marine Ins. Co.	5-13-33
5000.00	Old Colony	4- 5-33
$15,000.00		

Complainant's insurance policy of $3,000.00 on the building was one-fifth of the total fire insurance on the building. Complainant alleged in the bill that the building was of a value not to exceed $6,000.00. On motion to dismiss, this allegation must be taken as true.

Grand Chute v. *Winegar*, 15 Wall. (U. S.) 373, 376.

One-fifth of the total loss of $6,000.00 is $1,200.00. Adding to this $1,200.00, the full amount of the policy on the personal property, to-wit, $1,500.00, the total loss of

respondent under its own bill in equity cannot possibly exceed $2,700.00. Therefore, the jurisdictional amount is not involved.

In order to show that respondent's policies referred to in its bill in equity each contained a provision that the insurer was only to be liable for such proportion of any loss as the amount of the policy bore to the whole amount of fire insurance applying, whether such other insurance contained a similar clause or not, petitioners filed their motion in the United States Circuit Court of Appeals for completion of the record, filing the original policies with the clerk of said court. If the point we are making is meritorious, then the circuit court of appeals should have sustained said motion.

Federal Equity Rule 76.

Fairbanks, Morse & Co. et al. v. *American Valve & Meter Co. et al.*, 276 U. S. 305, 48 S. Ct. 317.

Barber Asphalt Paving Co. v. *Standard Asphalt & Rubber Co.*, 275 U. S. 372, 48 S. Ct. 183.

Hobbs v. *National Bank of Commerce of Kansas City*, 93 F. 615 (C. C. A. 2).

Rule 23 of 8th Circuit Court of Appeals.

We have requested the clerk of the circuit court of appeals to transmit said original policies to the clerk of this court. We quote from said policies as follows:

> "3. It is also a condition of this policy that if there be other fire insurance upon the property covered, this Company shall be liable only for such proportion of any direct loss or damage caused by fire or by lightning as the amount of this policy bears to the whole amount of fire insurance applying whether such other insurance contains a similar clause or not."
>
> Policy No. 910156.

"3. It is also a condition of this policy that if there be other fire insurance upon the property covered, this Company shall be liable only for such proportion of any direct loss or damage caused by fire or by lightning as the amount of this policy bears to the whole amount of fire insurance applying whether such other insurance contains a similar clause or not."

Policy No. 910254.

It is not the amount claimed in a prayer for relief, or which complainant says in its pleading is involved, that determines the jurisdiction of the federal court if the "unmistakable fact and legal certainty be" that a lesser amount is involved. The amount of loss is the amount involved, after fire.

New York Life Ins. Co. v. *Johnson*, 255 F. 958 (C. C. A. 8).

Swan Island Club v. *Ansell*, 51 F. (2d) 337 (C. C. A. 4).

Maryland Cas. Co. v. *Price*, 231 F. 397, l. c. 403 (C. C. A. 4).

Menssen v. *Trav. Ins. Co.*, 5 Fed. Sup. 114 (D. C. N. Y.).

Cowell v. *City Water Supply Co.*, 121 F. 53 (C. C. A. 8).

The amount of liability on the policies issued by the other companies mentioned in the bill does not increase the amount involved so far as complainant is concerned.

Ex parte Phoenix Ins. Co. of London et al., 117 U. S. 367, 6 S. Ct. 772.

Mechanics Ins. Co. of Phila. v. *C. A. Hoover Distilling Co.*, 173 F. 888 (C. C. A. 8).

Wisconsin Central Ry. Co. v. *Phoenix Ins. Co. et al.*, 123 F. 989 (C. C. Wisc.).

Furthermore, the bill of complaint affirmatively alleged that the building was not a total loss. Since there is no allegation of the amount of the loss to the building, it is impossible to ascertain how much damage there was thereto. It might only have been nominal damage. Consequently, the jurisdiction of the court has not been made to affirmatively and distinctly appear.

Norton v. *Larney*, 266 U. S. 511, 45 S. Ct. 145.

Smith v. *McCullough*, 270 U. S. 456, 46 S. Ct. 338.

POINT D.

(Specification 4.)

The Circuit Court of Appeals erred in holding that the two claims arising under the two policies of insurance issued by it could be tied together by the charge of concerted design and action to defraud, for the purpose of ascertaining the amount involved for jurisdictional purposes.

Concededly, the general rule is that separate claims cannot be tied together. The circuit court of appeals thought that the instant case fell within the rulings of two exceptional decisions of this court.

The first of the cases was *McDaniel* v. *Traylor*, 196 U. S. 415, 25 S. Ct. 369. This case involved a situation where conspirator creditors in league with the administrator of an estate had fraudulently proved and procured to be allowed in probate court illegal claims. The essence of the conspiracy was to fix on the estate of Hiram Evans, deceased, the debts of John Evans, which

the defendants, except the administrator, held. The single object, to-wit, to fasten John Evans' liabilities on Hiram Evans' estate, schemed at by all of the defendants, was quite properly measured as an entirety, and the amount involved was the total amount of John Evans' debts. This would have been true whether John Evans' debts were all held by one claimant or by many claimants.

In *Sovereign Camp* v. *O'Neill*, 266 U. S. 292, 45 S. Ct. 49, the alleged object of the conspirators was to ruin the defendant by numerous meritless suits, the defense of which entailed enormous expense. The real object was not to collect the various separate amounts sued for in said meritless suits. The main and controlling objective of these numerous suits being simply to ruin the defendant corporation, and that being the common object of the conspiracy (the suits being merely the device or overt acts resorted to in order to accomplish the main object), this court ruled that the singleness of the main object tied the incidental claims together into one.

These two cases properly analyzed bear no analogy to the case at bar. In the case at bar there is no single objective which ties these claims together. Here are involved just two insurance policies and two proposed suits at law, each to collect on one of the policies, with no further underlying objective. There is nothing exceptional in the circumstances of this case to tie the claims together, except that they had a common origin. It could just as well be urged that whenever a man, even

in the best of faith, takes out two fire policies on the same property, that his object is to collect just a single sum in the event of a fire, and that, consequently, the amount involved is that single sum. The case at bar falls within the rule often applied that common origin does not tie the claims together. It does not fall within the exception that where there is a single, controlling, ulterior objective, participated in by all of the parties involved, that then the claims will be tied together.

See also, *Phoenix Mut. Life Ins. Co.* v. *Bailey*, 13 Wall. (U. S.) 616.

POINT E.

(Specification 5.)

The Circuit Court of Appeals for the Eighth Circuit erred in holding there was equitable jurisdiction in the case at bar because of multiplicity of suits, or because of a threatened multiplicity of suits, for the reason that a judgment in favor of the complainant in either of said threatened suits would be a complete bar to recovery in the other.

Because there were two policies and a threatened suit on each, the circuit court of appeals concluded that there was a multiplicity of suits involved. This ruling conflicts with the following ruling of the United States Circuit Court of Appeals for the First Circuit.

Niagara Fire Ins. Co. et al. v. *Adams et al.*, 198 F. 822, l. c. 823 (C. C. A. 1).

It will be observed that Pete di Giovanni must be one of the plaintiffs in each suit. If the suit on the building, in which both Pete di Giovanni and his wife are plain-

tiffs, were tried first, then the judgment in that suit would be *res judicata* against Pete di Giovanni, so that there would be no danger to apprehend from the second suit, and there would be no multiplicity of suits or no further suit to try, as a matter of fact.

There is no presumption, that the case on the personal property will be tried before the case involving the building policy, yet, on the court's own theory, the court must assume and infer in order to justify a bill in equity, that the case brought by the husband alone on the personalty policy will be tried first. There is no such allegation in the bill. Why should such a thing be surmised? Under the facts of this pleading both suits would be filed at the same time and tried at the same time. Certainly until it actually appears and is alleged that the suit of the husband alone is going to be tried first, there is no reason to surmise that that will be done. It will be time enough to file a bill in equity to prevent a multiplicity of suits when it actually appears that there will be a multiplicity of suits, not merely that there is a possibility of same.

But let us suppose that Pete di Giovanni's suit on the policy covering the personalty is tried first and he is defeated. If he is there defeated, the suit on the policy covering the building cannot be maintained. For that suit must be maintained by *husband and wife*, as tenants by the entirety. Neither can recover singly. But as plaintiff Pete di Giovanni is barred from recovering, the liability as to him being *res judicata*, there can be no

joint recovery. It is the risk the wife took in accepting title as a tenant by the entirety.

Stifel's Union Brewing Co. v. *Saxy*, 273 Mo. 159, 201 S. W. 67.

Fulbright v. *Phoenix Ins. Co.*, 44 S. W. (2d) 115. 329 Mo. 207.

Respectfully submitted,

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